FILED
JUN 30 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 127

E. CREEKMORE, GENERAL CHAIRMAN OF THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL.,
Petitioners,

vs.

PUBLIC BELT RAILROAD OF NEW ORLEANS AND CITY OF NEW ORLEANS, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No. 127

E. CREEKMORE, General Chairman of the Brotherhood of Maintenance of Way Employes, et al.,
Petitioners,

vs.

PUBLIC BELT RAILROAD OF NEW ORLEANS and CITY OF NEW ORLEANS, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners, all appellants below, respectfully pray for the issuance of a writ of certiorari to review the judgment below dismissing petitioners' amended complaint (R. p. 72).

Jurisdiction.

The opinion of the Trial Court dismissing the amended complaint will be found at R. p. 54. The opinion of the court below will be found at R. p. 69. The opinion of the Trial Court is unreported and that of the court below is reported in 134 F. (2d) 576.

Summary Statement of Matter Involved.

The amended complaint was filed in the District Court by plaintiff as agent on behalf of five employees of the Public Belt Railroad, members of the Brotherhood of Maintenance of Way Employes, under Section 16(b) of the Fair Labor Standards Act, 52 Stat. 1069, 29 U. S. C. A. 216(b), asking for a judgment of $1246.00, representing a 6¢ per hour difference between the 30¢ hour-wage rate paid by the Public Belt Railroad and the order of the Administrator of the Fair Labor Standards Act, setting a minimum wage rate of 36¢ per hour for the Railroad Carrier Industry, as provided by Section 8 of the Fair Labor Standards Act, 52 Stat. 1064 (29 U. S. C. A. 208).

The amended complaint alleged that pursuant to Sections 5 and 8 of the Fair Labor Standards Act, hereinafter called the Act, the Acting Administrator of the Wage and Hour Division of the United States Department of Labor appointed an Industry Committee for the Railroad Carrier Industry, and after investigation and hearings, recommended to the Administrator the minimum wage rate in the Trunk and Short Line Divisions of the Railroad Carrier Industry (R. p. 22).

After extensive hearings the Railroad Carrier Industry recommended the minimum wage rate for all Trunk Line Railroads to be not less than 36¢ per hour and for all Short Line Railroads a minimum wage rate of not less than 33¢ per hour (R. p. 24). The report and recommendations of the Railroad Carrier Industry Committee were approved by the Administrator of the Wage and Hour Division February 14, 1941 (R. p. 22) and the Administrator of the Wage and Hour Division ordered the minimum wage rates to be effective as of March 1, 1941, for all employees of Short and Trunk Line Railroads, that were subject to

Part I of the Interstate Commerce Commission Act (R. p. 25).

The complaint further alleges that the Public Belt Railroad is a Trunk Line Division, and subject to Part I of the Interstate Commerce Commission Act, having an annual operating revenue of more than one million dollars per year and, therefore, subject to the minimum wage rate of 36¢ per hour (R. pp. 17-18).

As of the effective date of the order, the Public Belt Railroad was paying the plaintiffs herein and other employees similarly situated in its Maintenance of Way Department the sum of 30¢ per hour (R. p. 18) or $12.00 for a 40 hour week or $14.40 for a 48 hour week. The complaint further alleges that the Public Belt Railroad refused to pay the minimum wage rate of 36¢ per hour as required under the wage order of said Administrator (R. p. 18). The defendants moved to dismiss the amended complaint on the ground that the Railroad was municipally owned and that by Section 3(d) of the Fair Labor Standards Act 52 Stat. 1060, 29 U. S. C. A. 203, defining employers covered by the Act, the Public Belt Railroad was excluded from the provisions of the Act. Section 3(d) of the Fair Labor Standards Act provides:

> "Employer includes any person acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States, or any state, or political subdivision of a state".

The Trial Justice dismissed the amended complaint filing a written opinion (R. p. 58) holding that the Public Belt Railroad being wholly owned and operated by the City of New Orleans was expressly excluded by virtue of Section 3(d) of the Act in that it was "a political subdivision of a state", and that the Wage and Hour Administrator in an advisory opinion (R. p. 51) had ruled that the said Public

Belt Railroad was excluded from the provisions of the Act by virtue of Section 3(d) thereof (R. p. 53). The court below adopted the reasoning of the Trial Judge and affirmed the dismissal of the amended complaint on the grounds that a municipally owned railroad was exempt from the minimum wage requirements of the Act by virtue of Section 3(d), excluding employees "of the United States or any state or political subdivision of a state" (R. p. 69).

Statute Involved.

The Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. A. 201-219.

The court below held that the Public Belt Railroad was excluded by virtue of Sec. 3(d) of the Act, 52 Stat. 1060, 29 U. S. C. A. 203, *supra.*

PERTINENT SECTIONS OF THE ACT.

Title 29, Section 205 of the Act 52 Stat. 1062, 54 Stat. 616, entitled *Industry Committee.*

> "The Administrator shall as soon as practicable appoint an Industry Committee for each industry engaged in commerce or in the production of goods for commerce".

Title 29, U. S. C. A., Section 208, 52 Stat. 1064, Wage Orders:

> "(a) With a view to carrying out the policy of sections 201-219 of this title by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee each such industry, and the industry committee shall from time to

time recommend the minimum rate or rates of wages to be paid under section 206 of this title by employers engaged in commerce or in the production of goods for commerce in such industry or classification therein.

"(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under sections 201-219 of this title. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

* * * * * * *

"(f) Orders issued under this section shall define the *industries* and *classifications therein to which they are to apply*, and *shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.* No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance".

Manner of Operation of Public Belt Railroad.

The Public Belt Railroad is a railroad carrier engaged in the transportation over its lines of freight and passenger cars from points on its lines in the City of New Orleans to points outside the State of Louisiana. It is known in railroad terminology as "switching company" (R. p. 17).

The Public Belt Railroad picks up all railway cars brought into the City of New Orleans by other railway carriers from points both inside and outside the state, carries these cars over its own lines in the State of Louisiana and delivers said cars at their respective destinations and terminals in New Orleans, and where in turn the other railway carriers transport them to points outside the State of Louisiana (R. pp. 16, 37).

The Public Belt Railroad delivers freight in car load lots and even in less than car load lots (R. pp. 16, 37). This Railroad also picks up freight in less than car load lots from the wharves in New Orleans, especially fruit, bananas and spices from the tropics, that are brought in by steamship and barge lines and transports it over its own line to other terminals of other railroad carriers, where it is then delivered outside the State of Louisiana (R. p. 16).

Defendant further delivers freight brought into the city by other carriers from points outside the State and carries it directly to the wharves for further shipment by ships and barges. It serves all carriers who enter the City of New Orleans, together with handling freight from ship and barge at the wharves and carries freight directly from a number of industries within the City of New Orleans, by handling freight destined to and from points inside and outside the State by delivering the goods to the respective terminals of the various railroad carriers.

Ownership of Public Belt Railroad.

The Public Belt Railroad is owned and operated by the City of New Orleans. The City of New Orleans, by virtue of an ordinance of October 8, 1904 (R. p. 51) set up a commission known as the Public Belt Railway Commission (R. p. 33) composed of the Mayor and 16 citizens of the City of New Orleans who were to operate this railroad.

> "To Operate said Public Belt Railroad for the transportation of merchandise and freight in car loads or less than car loads and for the transportation of passengers for such rates, charges or tariff as may by said commission by and with the approval of the council of the City of New Orleans by each adopted" (R. p. 37).

The ordinance further provided:

> "Said commission shall have power and authority to make all regulations and by-laws for the conduct of its business as it sees fit and do all necessary things to accomplish its purpose and object; to employ all necessary persons and working force and to fix all compensation and salaries. All salaries of officers and employees shall be paid from the funds of the commission" (R. p. 38).

Thus, the salaries of these employees are not paid by the City of New Orleans, but are paid out of the funds and operating revenues of the railroad.

Question Presented.

Is a municipally owned railroad exempt from a minimum wage order for the Railroad Carrier Industry, issued by the Administrator of the Fair Labor Standards Act, by virtue of Section 3(d) of the Act, which excludes as an employer the "United States or any State or political subdivision thereof", where that railroad is subject to the Interstate Commerce Commission Act, the Railway Labor Act, Railway Retirement Act, and all Federal legislation governing and controlling the railroad industry, and where such railroad is serving purely proprietary benefits of the city and is not part of the essential functional operation of the municipal government.

Reasons Relied On for the Allowance of the Writ.

IMPORTANCE OF QUESTION.

The primary question presented, involves the construction of Section 3(d) of the Fair Labor Standards Act 52 Stat. 1060 (29 U. S. C. A. 203(d)) which, if the ruling of the lower court is upheld, would exempt the employers of all municipally owned railroads that are subject to Part I of the Interstate Commerce Commission Act from paying the minimum wage rate that is required under the Act of all other railroad carriers in the United States. The construction adopted by the court below would permit municipally owned and state owned railroads to pay substandard wages below the minimum set by the Railroad Carrier Industry Committee for all other Railroad Carriers subject to Part I of the Interstate Commerce Commission Act.

By the ruling of the court below all employees of municipally and state owned railroads are denied the beneficial effect of the wage provisions of the Act. The question here presented to the court is of vital importance to all railroad employees, since the ruling below exempts the Public Belt Railroad under the Act, when that Railroad is in direct competition with other railroad carriers throughout the United States.

The decision below allows the State "to go into business" far afield from its natural sphere as a political entity, wherein it competes with other private enterprises, but exempts it from meeting the requirements of this Act when the primary purpose of the Act was to remedy substandard working conditions. The decision of the court below is contrary to the intent of Congress, since in all other beneficial legislation passed by Congress for the Railroad Industry this Railroad is specifically covered. Congress has shown a clear intent that this particular type of railroad

should be covered under the Act. Congress has covered it by the Safety Appliance Act, 27 Stat. 531, Title 45 U. S. C. A., Section 1; Liability for Injuries to Employees, 53 Stat. 1404, 45 U. S. C. A., Section 51; Hours of Service Act, 34 Stat. 1415, 45 U. S. C. A., Section 61-62; Railway Labor Act, 44 Stat. 537, 54 Stat. 785-786, 45 U. S. C. A., Section 151; Retirement of Railway Employes, 56 Stat. 209, 45 U. S. C. A., Section 228.

Further, the construction of the lower court contradicts the express wording of the Act. The court below ruled that in accepting the literal meaning of the word "state or political subdivision" the Public Belt Railroad was excluded from meeting the minimum wage requirements of the wage order. The court below arrived at an unreasonable and an absurd result by the alleged literal meaning of the words "state or political subdivision", for in an examination of the whole Act, it will be found that Congress not only intended that this Railroad be covered, but the Act specifically provides that all railroad employees should receive the benefits of the Act. Section 7 of the Act, 55 Stat. 756 (Title 29 U. S. C. A., Section 207) provides for the establishment of maximum hours of work in a given week. Section 13(b) of the Act 53 Stat. 1266 (Title 29 U. S. C. A., Section 213(b)) provides:

> "(b) The provisions of section 207 of this Title" (Title 29, Section 207) "shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49; or (2) any employee of an employer subject to the provisions of section 1-27 of Title 49".

Exception (1) of this paragraph, *supra*, applies to motor carriers, and Exception (2) applies to all railroads in the United States, including the Public Belt, which are subject

to Part I of the Interstate Commerce Commission Act 41 Stat. 474-478 (Title 49 U. S. C. A., Section 1-47) and confers on the Interstate Commerce Commission the power and right to regulate the maximum hours of service. The Congress here specifically provided, that inasmuch as it had regulated for all carriers as to the maximum hours of service and conferred that power upon the Interstate Commerce Commission, it specifically exempted the Railroad Industry from the maximum hours provision of Section 7 of the Fair Labor Standards Act. But in doing so, Congress thereby expressly provided that all railroad carriers coming within the meaning and coverage of the Interstate Commerce Commission Act were to be covered by the minimum wage provisions of the Fair Labor Standards Act.

The Public Belt Railroad by judicial decision has been held to come within the meaning of the Interstate Commerce Commission Act, and it is admitted in the record. The Public Belt Railroad is subject to the Interstate Commerce Commission (Title 49, U. S. C. A., Section 1-27) Act.

Higginbothan v. *Public Belt R. R.,* 192 La. 549.

The Railroad Carrier Industry Committee that was set up pursuant to Section 5 of the Fair Labor Standards Act 54 Stat. 615 (R. pp. 22-27) defined the Railroad Carrier Industry and divisions thereof as follows:

> "For the purposes of this order the term 'railway carrier industry' means the industry carried on by any express company, sleeping car company, or carrier by railroad, subject to Part I of the Interstate Commerce Commission Act * * *."

This Industry Committee comprised four disinterested persons representing the public and a like number representing employers in the industry, and a like number repre-

senting railroad employees. The order covered all carriers subject to Part I of the Interstate Commerce Commission Act, and thus it was that this Committee, who knew intimiately the Railroad Industry, expressly covered the Public Belt Railroad. This Committee in covering all carriers subject to Part I of the Interstate Commerce Commission Act carried out the true legislative intent of the Congress.

Thus, in exempting the Railroad Industry from the maximum hours provisions of the Fair Labor Standards Act, Congress knew that it had already legislated for the Railroad Industry on this particular provision by granting that power to the Interstate Commerce Commission, and thus expressly provided that all the railroads, who were engaged in interstate commerce or who were subject to the Interstate Commerce Commission authority, be bound and covered by the minimum wage under the provisions of that Act. In construing this Act, it is presumed that Congress had former remedial statutes before it, and that it was acquainted with their judicial construction.

State v. *Gerhardt*, 145 Ind. 439, 44 N. E. 469, 35 L. R. A. 313;

Reiche v. *Smythe*, 80 U. S. 162, 13 Wall. 162, 20 L. Ed. 566;

Maddock v. *Magone*, 152 U. S. 368, 14 Sup. Ct. 588, 38 L. Ed. 482.

Inasmuch as this statute is a remedial one under the cases, it should have been liberally construed (*Fleming* v. *Hawkeye Pearl Button*, 113 F. (2d) 52 and the judicial distinction of a municipal corporation acting in a governmental or essential function and a municipal corporation acting in a purely proprietary capacity should have been adopted by the court below in construing the Act.

Probable Conflict With Other Decisions of This Court.

It is a well known doctrine, long applied by this Court, that a municipal corporation or State acting in a purely proprietary field as distinguished from a governmental function is subject to the same provisions of law governing private enterprises. (*Helvering* v. *Powers*, 293 U. S. 214, 79 L. Ed. 291, 55 S. Ct. 171.)

The construction given under this Act by the court below is contrary to this well settled doctrine. In the 1913, 1916, 1917 Internal Revenue Statutes, Congress exempted from taxation all officers or employees of the "state or any political subdivision thereof", using language almost identical with that under the Act. But this Court never held that Congress intended that an employee working in a purely proprietary capacity was exempt from the taxation. *Helvering* v. *Powers, supra.*

After this particular provision was dropped from the income statutes in 1917, the court continued to uphold the distinction between a proprietary and functional activity of the State government.

The Public Salary Tax Act of 1939, 53 Stat. 575-577, I. C. C. H. Sec. 26, 042 included for the purposes of taxation from and after January 1, 1939, all the employees of the State, regardless of the nature of their employment, but abated, and if paid, made provisions for a refund of all taxes prior to January 1, 1939, to "an officer or employee of a state or any political subdivision thereof, or any agency or instrumentality of any one of the foregoing". This particular language is almost identical with that used in Section 3(d) of the Act, and if this Court were to construe the section of the Public Salary Tax Act exempting "employees of a state or any political subdivision" as the court below has construed Section 3(d) of the Act, then this Court would be holding contrary to that well known

construction that has been given to words of this character under all the tax acts and would be holding in effect, that all employees of the State government would be excused from the tax. This would be entirely contrary to the decisions of this Court, which have always made this well known distinction.

Helvering v. *Powers, supra;*
Metcalf v. *Mitchell,* 269 U. S. 513, 70 L. Ed. 384;
Buckstaff Bathouse Co. v. *McKinley,* 308 U. S. 358, 84 L. Ed. 322.

Again, in character with the decisions of this Court, the Treasury Department in its Regulations T. D. 5214 (Section 18.2) approved Jan. 15, 1943, in keeping within the well defined distinction as laid down by this Court has determined that "an officer or employee of a state or political subdivision" is entitled to the benefits of Section 203 of the Public Salary Tax Act "if under these regulations the Commissioner of Internal Revenue finds that such compensation *was for personal service rendered in the exercise of a governmental function as distinguished from proprietary function",* and in Section 18.3 of the above regulations, it is pointed out that such employees as school teachers, liquidators of banks and insurance companies, taken over by the State, etc. are allowed an abatement or refund of the tax, but that employees of *a State liquor store or a municipality owned railroad are not.*

Wherefore petitioners pray that the petition herein be granted and the judgment below be reversed.

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